Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CATHERINE O'BOYLE, *et al.*,

Petitioners,

v.

DAVID L. BRAVERMAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a complaint can be dismissed on a Fed. R. Civ. P. 12(b)(6) motion when it is not clear on its face that the matter is barred by the statute of limitations.

PARTIES TO THE PROCEEDINGS

Pursuant to *R.* 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Third Circuit.

The petitioners here and appellants below are Catherine O'Boyle; Martin E. O'Boyle, individually and as General Partners in New Midland Plaza Associates, a Tennessee General Partnership, and as General Partners in Commerce Partnership No. 1147, a Florida General Partnership, and Partnership No. 1171, a Florida General Partnership.

The appellees below and respondents here are David L. Braverman; Braverman & Kaskey, LTD, a New Jersey and Pennsylvania Professional Corporation, formerly known as and doing business as Braverman, Daniels, Kaskey, Ltd.; Fellheimer, Braverman & Kaskey.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Factual Background	2
B. Proceedings Below	4
REASONS FOR GRANTING THE PETITION	4
I. THE DECISION BELOW CREATES A DIRECT CONFLICT WITH TWO OTHER CIRCUIT COURT OF APPEALS ON A FUNDAMENTAL RULE 12(b)(6) ISSUE, WHICH IN THE	

Contents

Page

THIRD CIRCUIT SERVES TO EXTINGUISH A CITIZEN'S CONSTITUTIONAL RIGHT OF REDRESS IN THE FEDERAL SYSTEM 4

CONCLUSION 10

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Third Circuit Filed July 15, 2009 ..... 1a

Appendix B — Opinion And Order Of The United States District Court For The District Of New Jersey Filed August 12, 2008 ..... 12a

TABLE OF CITED AUTHORITIES

Page

CASES

Andonissamy v. Hewlett-Packard Co., 547 F.3d 841 (7th Cir. 2008) 9

Supermail Cargo, Inc. v. U.S., 68 F.3d 1204 (9th Cir. 1995) 8, 9

Von Saher v. Norton Simon Museum of Art at Pasadena, 578 F.3d 1016 (9th Cir. 2009) 7, 8

STATUTES

28 U.S.C. § 1254 1

28 U.S.C. § 1332 4

RULES

Federal Rule of Civil Procedure 12(b)(6) ..... *passim*

Supreme Court Rule 10 10

OPINIONS BELOW

The unreported opinion of the Third Circuit Court of Appeals can be found at 2009 WL 2038654, and is reprinted in this Appendix at 1a-11a. The unreported District Court decision is reprinted at 12a-47a.

JURISDICTION

The Court of Appeals entered its decision on July 15, 2009. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED

This case involves application of Federal Rule of Civil Procedure 12(b)(6), which provides:

> (b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
>
> (1) lack of subject-matter jurisdiction;
>
> (2) lack of personal jurisdiction;
>
> (3) improper venue;
>
> (4) insufficient process;
>
> (5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

STATEMENT OF THE CASE

A. Factual Background

Plaintiff Martin O'Boyle's and plaintiff Catherine O'Boyle's ("the O'Boyles") legal malpractice action against defendant David Braverman ("Braverman") stems from deficient representation in connection with a Tennessee lawsuit which spawned collateral litigation in Florida and New York. At all relevant times the O'Boyles were general partners in a Tennessee partnership named New Midland Plaza Associates and two Florida partnerships. (13a-14a). Braverman was hired on October 8, 1998 to represent New Midland in a dispute with its mortgage lender, First Union National Bank.

The O'Boyles sought damages against First Union for a pattern and practice of wrongful conduct which included, among other things, the misappropriation of over $680,000 of New Midland Funds and breach of contract. (15a). A complaint was filed against First Union on April 21, 1999. The Tennessee litigation was dismissed on December 14, 2005 and sanctions of approximately $1.2 million were levied upon Martin O'Boyle personally on November 2, 2006. The O'Boyles were later forced to dismiss their appeal in order to vacate the sanctions on December 27, 2007.

Following the dismissal, the O'Boyles brought suit in New Jersey state court against Braverman on December 14, 2007. The complaint sounded in negligence and breach of contract and spanned over two distinct time frames: the period from entry into a retainer agreement until the decision was made to file in Tennessee, and the period after suit was filed until the dismissal of the appeal. The matter was later removed to the District Court on January 31, 2008 and defendant Braverman's motion to dismiss was granted on August 12, 2008. In dismissing the suit, the court applied New Jersey's choice of law analysis and concluded that Tennessee law applied. It ruled that the O'Boyles' injuries were suffered, at the latest, on November 2, 2006, and therefore barred under Tennessee's one year statute of limitations for legal malpractice. (31a).

B. Proceedings Below

This case was commenced on December 14, 2007, when the O'Boyles filed a civil complaint in the Atlantic County, New Jersey, Superior Court. The case was removed to the District Court, which exercised jurisdiction pursuant to 28 U.S.C. § 1332. On March 14, 2008 Braverman filed a motion to dismiss, and on March 24, 2008 the O'Boyles submitted opposition. On August 7, 2008 the District Court heard oral argument and on August 12, 2008, it granted Braverman's motion to dismiss.

Appeal was taken by the O'Boyles on September 11, 2009 to the Third Circuit. The O'Boyles filed their brief on February 6, 2009 and Braverman filed his brief on March 9, 2009. On July 15, 2009 the Third Circuit affirmed the District's Court's opinion. (11a).

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CREATES A DIRECT CONFLICT WITH TWO OTHER CIRCUIT COURT OF APPEALS ON A FUNDAMENTAL RULE 12(b)(6) ISSUE, WHICH IN THE THIRD CIRCUIT SERVES TO EXTINGUISH A CITIZEN'S CONSTITUTIONAL RIGHT OF REDRESS IN THE FEDERAL SYSTEM

The District Court and Third Circuit relied on the O'Boyles' December 14, 2007 complaint and multiple extrinsic documents deemed public to find that suit was barred by Tennessee's one year statute of limitations. Had the District Court and Third Circuit relied

exclusively on the O'Boyles' complaint, the motion to dismiss would have been denied and plaintiffs permitted to factually establish that their action was within the 1 year limitation. The two dates listed in the complaint were: October 8, 1998 (the date the retainer agreement between the O'Boyles and Braverman was executed), and April 21, 1999 (the date suit was filed in the Tennessee lawsuit, *New Midland Plaza, et al. v. First Union National Bank, et al.*, which spawned the present litigation).

In concluding that it was permissible to use extrinsic documentation in a 12(b)(6) context, the District Court explained that:

> Although a statute of limitations defense is typically raised in the defendant's answer, the so-called 'Third Circuit Rule' permits such a defense to be raised in a Rule 12(b)(6) motion if 'the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations' *Robinson v. Johnson*, 313 F.3d 128, 135 (3d Cir. 2002) (quoting *Hanna v. U.S. Veterans' Admin.Hosp.*, 514 F.2d 1092, 1094 (3d Cir. 1975)). 'If the bar is not apparent on the face of the complaint, then it may not afford the basis for a dismissal of the complaint under Rule 12(b)(6).' *Id.* (quoting *Bethel v. Jendoco Constr. Corp.*, 570 F.2d 1168, 1174 (3d Cir.1978)). But courts are permitted to examine public records, including those concerning judicial proceedings, when considering a motion to dismiss for failure to

> state a claim. *See S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999). This is true even if the motion to dismiss is premised on a statute of limitations argument. *See Caleb v. CRST*, Inc., 43 Fed. Appx. 513, 515 (3d Cir. 2002). As discussed below, the Complaint itself and several public records related to the Tennessee Litigation reveal that this action is untimely.

(24a). On appeal, the Third Circuit upheld this ruling, reasoning that:

> The District Court, in deciding this case, considered Tennessee court documents for the purpose of determining the dates on which the Tennessee litigation was dismissed and on which the Tennessee court levied sanctions on Appellants. Appellants argue that, as it decided this case in the context of a Rule 12(b)(6) motion, the District Court's dismissal on statute of limitations grounds was improperly based on public records that were outside the face of the complaint. Similar arguments have been rejected by this and other Courts of Appeals. This Court has held that,
>
> > [t]o resolve a 12(b)(6) motion, a court may properly look at public records, including judicial proceedings, in addition to the allegations in the complaint. Specifically, on a motion

> to dismiss, we may take judicial notice of another court's opinion—not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity.
>
> *Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 426-27 (3d Cir. 1999) (citations omitted). Accordingly, it was not improper for the District Court to take judicial notice of Tennessee court documents in deciding the Rule 12(b)(6) motion at issue.

(3a-5a).

A very recent Ninth Circuit Court of Appeals decision, *Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016 (9th Cir. 2009), dealt with this issue in connection with a lawsuit to return artifacts allegedly stolen by the Nazis during World War II. The Ninth Circuit held that a Fed. R. Civ. P. 12(b)(6) motion based upon a statute of limitation is *only* permissible when the complaint irrefutably displays that that the action is time barred:

> A claim may be dismissed under Rule 12(b)(6) on the ground that it is barred by the applicable statute of limitations only when 'the running of the statute is apparent on the face of the complaint.'

* * *

> [T]he Museum fails to point to any authority which holds that a motion to dismiss based on a statute of limitations may be granted on the basis of facts judicially noticed, rather than facts apparent on the face of the complaint.
>
> From the face of Saher's complaint, it is not clear that the statute of limitations has expired. Unless it is clear that the complaint could not be saved by amendment, dismissal with prejudice and without leave to amend is not appropriate. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Accordingly, Saher's complaint should not have been dismissed without leave to amend.

Id. at 1031. In explaining the reasoning behind such a rule, *Supermail Cargo, Inc. v. U.S.*, 68 F.3d 1204 (9th Cir. 1995), detailed how:

> A motion to dismiss based on the running of the statute of limitations period may be granted only 'if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled.' *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980). In fact, a complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the

> timeliness of the claim. Id. (citing *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)).

Id. at 1207.

The Seventh Circuit is in accord with the Ninth Circuit. In *Andonissamy v. Hewlett-Packard Co.*, 547 F.3d 841 (7th Cir. 2008), the appellate court held that:

> A statute of limitations defense, while not normally part of a motion under Rule 12(b)(6), is appropriate where 'the allegations of the complaint itself set forth everything necessary to satisfy the affirmative defense, such as when a complaint plainly reveals that an action is untimely under the governing statute of limitations.'

Id. at 847. The *Von Saher* and *Andonissamy* decisions underscore the requirement that complaints must be read liberally to give plaintiffs every benefit of the doubt in a Rule 12(b)(6) context. This reasoning is in line with the basic underpinnings of Fed. R. Civ. P. 12(b)(6), which is designed to test the sufficiency of a pleading, not the weight of evidence.

CONCLUSION

The Third Circuit's ruling on the use of extrinsic and judicially noticed "facts" in the operation of a Fed. R. Civ. P. 12(b)(6) motion, mandates dismissal, while the ruling of the Ninth and Seventh Circuits dictate the precise opposite. The disparity authorizes a loss of a substantial right in the Third Circuit, and more importantly, causes an exceptional application of a rule, intended to effect judicial uniformity. The viability of a plaintiff's cause of action should not be subject to the fortuity of any one circuit's idiosyncratic standards. A petition for writ of certiorari shall be granted where:

> [A] United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . .

Supreme Court Rule 10. This case presents a diametrically opposed application of Fed. R. Civ. P. 12(b)(6) within the federal circuits on determining when and whether the rule can extinguish a plaintiff's otherwise viable cause of action in legal malpractice. The direct conflict of law between the Third Circuit and Seventh and Ninth Circuits presents an important issue of federal rule interpretation and application that compels this Court's supervisory review.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JULY 15, 2009

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-3865

CATHERINE O'BOYLE; MARTIN E. O'BOYLE, individually and a General Partner in New Midland Plaza Associates, a Tennessee General Partnership, and as General Partner in Commerce Partnership No. 1147, a Florida General Partnership, and as Partnership No. 171, a Florida General Partnership,

Appellants

v.

DAVID L. BRAVERMAN, Attorney Pro Se; BRAVERMAN & KASKEY, a NEW JERSEY and PENNSYLVANIA PROFESSIONAL CORPORATION, formerly known as and doing business as BRAVERMAN, DANIELS, KASKEY, LTD; FELLHEIMER, BRAVERMAN & KASKEY; JOHN DOE ATTORNEYS 1-5; XYZ ENTITIES 6-10; (ficticious names), jointly, severally and individually.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 1-08-cv-00553)
District Judge: Honorable Joseph H. Rodriguez

Appendix A

Submitted Pursuant to Third Circuit LAR 34.1(a)
June 12, 2009

Before McKEE, HARDIMAN, and
VAN ANTWERPEN, *Circuit Judges.*

(Filed July 15, 2009)

VAN ANTWERPEN, *Circuit Judge.*

Appellants Catherine and Martin O'Boyle were general partners in New Midland Plaza Associates ("New Midland"), a Tennessee partnership; they were also partners in two Florida partnerships, both of which had ownership interests in New Midland.[1] Appellants retained Appellee Braverman and his former law firm to represent New Midland in its dispute with a mortgage lender. Braverman filed suit on behalf of Appellants in Tennessee court in April 1999. In the current case, which was filed in New Jersey court on December 14, 2007, and was subsequently removed to federal court, Appellants claim that Braverman failed to use due care in connection with the Tennessee litigation and that his malpractice resulted in the dismissal of the Tennessee case and in the Tennessee court levying sanctions on Appellants.

Braverman moved to dismiss the action and the District Court granted Braverman's motion under

1. Either directly or through the Florida partnerships, Martin O'Boyle had a 99.87% interest in New Midland and Catherine O'Boyle owned the remaining 0.13%.

Federal Rule of Civil Procedure 12(b)(6). In dismissing the case, the District Court applied New Jersey choice of law principles and concluded that Tennessee law applied. It ruled that, because Appellees filed suit on December 14, 2007, and their injuries were suffered no later than November 2, 2006, the action was barred under Tennessee's one year statute of limitations for legal malpractice claims. For the following reasons, we agree and will affirm the decision of the District Court.

I.

The District Court had jurisdiction under 28 U.S.C. § 1332. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. When considering a district court's grant of a motion to dismiss under Rule 12(b)(6) we exercise plenary review and accept all factual allegations in the complaint as true, viewing them in the light most favorable to the plaintiff. *Umland v. PLANCO Financial Services, Inc.*, 542 F.3d 59, 64 (3d Cir. 2008). In doing so, we "determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Id.* (quotation marks omitted).

II.

The District Court, in deciding this case, considered Tennessee court documents for the purpose of determining the dates on which the Tennessee litigation was dismissed and on which the Tennessee court levied sanctions on Appellants. Appellants argue that, as it decided this case in the context of a Rule 12(b)(6)

motion, the District Court's dismissal on statute of limitations grounds was improperly based on public records that were outside the face of the complaint. Similar arguments have been rejected by this and other Courts of Appeals.[2] This Court has held that,

> [t]o resolve a 12(b)(6) motion, a court may properly look at public records, including judicial proceedings, in addition to the allegations in the complaint.
>
> Specifically, on a motion to dismiss, we may take judicial notice of another court's opinion-not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity.

---

2. *See Staehr v. Hartford Financial Services Group, Inc.*, 547 F.3d 406, 425 (2d Cir. 2008) ("Although the general rule is that a district court may not look outside the complaint and the documents attached thereto in ruling on a Rule 12(b) motion to dismiss, we have acknowledged that the court may also consider matters of which judicial notice may be taken. . . . Dismissal under Fed.R.Civ.P. 12(b)(6) is appropriate when a defendant raises a statutory bar as an affirmative defense and it is clear from the face of the complaint, *and matters of which the court may take judicial notice*, that the plaintiff's claims are barred as a matter of law." (internal quotation marks, alteration marks, and citations omitted; emphasis in original)); *accord Levy v. Ohl*, 477 F.3d 988, 991-92 (8th Cir. 2007); *Rodi v. Southern New England School of Law*, 389 F.3d 5, 18-19 (1st Cir. 2004).

Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd., 181 F.3d 410, 426-27 (3d Cir.1999) (citations omitted). Accordingly, it was not improper for the District Court to take judicial notice of Tennessee court documents in deciding the Rule 12(b)(6) motion at issue.

III.

New Jersey's choice of law rules apply to this case.[3] Appellants argue that the District Court's application of New Jersey's choice of law rules was flawed in that the court erred in finding an actual conflict between the New Jersey and Tennessee statutes of limitations and that, even if a conflict exists, the court erred in concluding that Tennessee law applied. We disagree, and for the following reasons, will affirm the District Court's order dismissing this case.

Appellants maintain that their action is timely under both the New Jersey and Tennessee statutes of limitations. We disagree. Tennessee's statute of limitations for legal malpractice claims is one year from the time the cause of action accrues. Tenn.Code Ann. § 28-3-104(a)(2). New Jersey, on the other hand, allows six years from the accrual of the cause of action.

---

3. In a diversity action, a federal court "must apply the choice of law rules of the forum state to determine what law will govern the substantive issues of a case." *Warriner v. Stanton*, 475 F.3d 497, 499-500 (3d Cir. 2007) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)). The parties do not dispute the applicability of New Jersey's choice of law rules.

McGrogan v. Till, 771 A .2d 1187, 1194 (N.J. 2001) (holding that legal malpractice actions are governed by the six year statute of limitations contained in N.J.S.A. 2A:14-1). Under the law of both states, a legal malpractice action accrues when the plaintiff suffers actual damage and discovers, or through the use of reasonable diligence should have discovered, that the defendant-attorney's conduct caused this damage. *See John Kohl & Co. v. Dearborn & Ewing*, 977 S.W.2d 528, 532 (Tenn. 1998); *Vastano v. Algeier*, 837 A.2d 1081, 1084 (N.J. 2003). There is no dispute that the current action would be timely under New Jersey law.

Tennessee law holds that "[i]t is a court's judgment that decrees the loss of a right or remedy or imposes a legal liability. Thus, when a judgment is entered, a 'legally cognizable injury' occurs." *Cherry v. Williams*, 36 S.W.3d 78, 85 (Tenn. Ct. App.2000); *see also Carvell v. Bottoms*, 900 S.W.2d 23, 29 (Tenn. 1995) (rejecting the argument that the statute of limitations for legal malpractice should be tolled pending the appeal of the underlying suit). We thus reject Appellants' argument that their cause of action accrued on December 27, 2006, the date on which they settled the appeal in the Tennessee action. As noted by the District Court,

> [t]he only injuries alleged in the Complaint are the dismissal of the Tennessee Litigation and the imposition of sanctions against Plaintiffs. According to public records related to the Tennessee Litigation, these sanctions were first imposed on September 27, 2005. The

> state court filed its final decree dismissing the Tennessee Litigation on December 14, 2005. Then, on November 2, 2006, additional sanctions were imposed. . . . Thus, this action accrued no later than November 2006.

Appellants filed their Complaint on December 14, 2007. The District Court correctly held that, even giving Appellants the benefit of the latest possible date of accrual—November 2, 2006—the current action was not timely under Tennessee's one year statute of limitations.

Having established a conflict between the application of New Jersey's and Tennessee's statutes of limitations to this case, we must determine which one to apply. The New Jersey Supreme Court "abandoned the 'mechanical rule' that the New Jersey statute of limitations still applied in cases where a foreign substantive law was chosen, in an attempt to discourage forum shopping. Instead, New Jersey 'borrows' the statute of limitations of the state whose substantive law applies to the case." *Warriner v. Stanton*, 475 F.3d 497, 500 n. 2 (3d Cir. 2007) (citing *Heavner v. Uniroyal, Inc.*, 305 A.2d 412, 418 (N.J. 1973)). Thus, we proceed to determine whether New Jersey's or Tennessee's substantive law applies.

During the pendency of this appeal, the New Jersey Supreme Court altered its framework for resolving

conflict of law disputes arising out of tort claims.[4] *P.V. v. Camp Jaycee*, 962 A.2d 453, 460 (N.J. 2008). In *Camp Jaycee*, the Court expressly adopted the Restatement (Second) of Conflict of Laws's most significant relationship test. *Id.* Under this test, we apply the "general principle" of § 145, as viewed through the "prism" of § 6. *See id.* at 458-59. Section 145 states that

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.[5]

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4. While Appellants advance their legal malpractice claim under both tort and contract theories, "whether a plaintiff employs an underlying theory of contract or tort in a legal-malpractice action is irrelevant to the statute of limitations inquiry. . . . Decades of unbroken precedent in New Jersey . . . illustrate that the essence of the typical legal-malpractice claim is 'tortious injury to the rights of another.' " *McGrogan v. Till*, 771 A.2d 1187, 1192-93 (N.J. 2001) (citations omitted).

5. Section 6 states that, in the absence of a statutory directive on choice of law, the factors relevant to the choice of the applicable rule of law include

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(Cont'd)

Appendix A

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil[e], residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

(Cont'd)

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6 (1971).

> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Restatement (Second) of Conflict of Laws § 145 (1971).

The District Court decided this case using the governmental interest analysis in effect before *Camp Jaycee*. According to the New Jersey Supreme Court, the " 'governmental-interest test is substantially similar to the most-significant-relationship test,' " as it "embodies all of the elements of the governmental interest test plus a series of other factors deemed worthy of consideration." *Camp Jaycee*, 962 A.2d at 459 n. 4 & 460 (quoting *Fu v. Fu*, 733 A.2d 1133, 1152 (N.J.1999) (Pollock, J., dissenting)). We thus need not belabor our discussion of the above factors, which were addressed in detail by the District Court.

The alleged injury at issue is the dismissal of the Tennessee suit and the Tennessee court's imposition of sanctions. Both this injury and the conduct that caused the injury—Braverman's allegedly improper handling of the Tennessee litigation—occurred in Tennessee. Appellees' involvement in the Tennessee lawsuit arose out of their status as general partners in New Midland, a Tennessee General Partnership with its principal place of business in Tennessee. As the Appellants hired Braverman "for the purpose of filing a lawsuit . . . in Tennessee," the parties' relationship is centered in Tennessee. The only factors weighing in favor of the application of New Jersey law are Catherine O'Boyle's

New Jersey citizenship and the fact that Braverman is a member of the New Jersey bar. These factors are insufficient to overcome the fact that Tennessee has the most significant relationship to a claim of legal malpractice arising out of litigation that took place in its courts and involved an entity formed under its laws.

For these reasons, we agree with the District Court's discussion of the § 145 factors, conclude that this suit was properly dismissed as time barred under Tennessee's statute of limitations, and will affirm the decision of the District Court.[6]

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6. We have carefully considered the parties' other arguments and conclude that they are either without merit or moot in light of our statute of limitations decision.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED AUGUST 12, 2008

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

CATHERINE O'BOYLE, et al.,

Plaintiffs,

v.

DAVID L. BRAVERMAN, et al.,

Defendants.

Hon. Joseph H. Rodriguez

Civil Action No. 08-553

Opinion & Order

This is a legal malpractice action relating to litigation gone awry in Tennessee. The plaintiffs, Catherine O'Boyle ("Catherine") and Martin O'Boyle ("Martin"),[1] originally filed this action in New Jersey Superior Court on December 14, 2007. One of the defendants, David L. Braverman ("Braverman"), removed the case to this Court on January 31, 2008, asserting federal jurisdiction based on diversity of

1. The O'Boyles will often be referred to collectively as "Plaintiffs."

citizenship. In so doing, however, Braverman failed to allege the citizenship of each member of a limited liability company which, according to the case caption, is the predecessor in interest to another defendant. Braverman now moves to amend the Notice of Removal to correct this error. He likewise moves to dismiss this case for a variety of reasons, including that it is untimely and that the Complaint fails to state a claim for relief.

Plaintiffs submitted no opposition to Braverman's motion to amend, (*See* Docket Entry No. 17.) Nonetheless, subsequent to Braverman's filing of that motion, Plaintiffs moved to remand this action to the state court based on Braverman's failure to allege the citizenship of the limited liability company's members. Plaintiffs have filed opposition to Braverman's motion to dismiss.

Pursuant to Rule 78 of the Federal Rules of Civil Procedure, no oral argument was heard on Braverman's motion to amend or Plaintiffs' motion to remand. However, oral argument was entertained on the motion to dismiss. For the following reasons, Braverman's motions are granted, while Plaintiffs' motion to remand is denied.

I. BACKGROUND

Plaintiffs, who are mother and son, were general partners in a Tennessee partnership called New Midland Plaza Associates ("New Midland"). They were also partners in two Florida partnerships called Commerce Partnership

No. 1147 and Commerce Partnership No. 1171, both of which had ownership interests in New Midland.[2]

According to the Complaint,[3] Plaintiffs retained Braverman and his law firm at the time, Fellheimer, Braverman & Kaskey, P.C., in October 1998. (Compl. 1/1.) Plaintiffs hired Braverman to represent New Midland in a dispute it had with a mortgage lender, First Union National Bank ("First Union"). (*Id.*) Specifically,

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2. In 1999, New Midland filed a Chapter 11 petition in the United States Bankruptcy Court for the Southern District of Florida. (*See* Braverman's Br. Supporting Dismissal, Exh. B, p. 3.) In an opinion confirming New Midland's reorganization plan, the bankruptcy court noted the ownership structure of New Midland:

> [Martin] O'Boyle, the managing general partner, owns 69.13% of the partnership interest in his individual capacity. . . . The remaining partnership interests are owned by Catherine O'Boyle, [Martin's] mother, who owns 0.10%; Commerce Partnership 1147, which owns 26.92%; and Commerce Partnership 1171, which owns 3.85%. [Martin] in turn owns 99.9% of the partnership interest of Commerce Partnership 1147 and Commerce Partnership 1171, with Catherine O'Boyle owning the remaining 0.10%.

In re New Midland Plaza Assocs., 247 B.R. 877, 881, 2000 Bankr. LEXIS 449 (Bankr. S.D. Fla. 2000). Thus, Martin owned, directly or indirectly, a 99.87% interest in New Midland while Catherine possessed a 0.13% stake in the company.

3. Citations to the Complaint will take the form of "Compl. X/Y," with "X" representing the Count and "Y" representing the paragraph within that Count.

Appendix B

> Plaintiffs sought the legal representation and expertise of defendants for the purpose of filing a lawsuit against First Union National Bank and other defendants in the Circuit Court of Blount County, Tennessee, for a pattern and practice of wrongful conduct by First Union, in part, the misappropriation of more than $680,000 of New Midland Funds, as well as for breach of contract, declaratory and injunctive relief.

(*Id.*)

Braverman evidently filed Plaintiffs' suit against First Union in the Tennessee court in April 1999.[4] (*Id.* 1/5.) Plaintiffs claim, however, that Braverman failed to use due care in the prosecution of the case. (*Id.* 1/6.) Braverman's alleged malpractice caused Plaintiffs damage insomuch as the Tennessee Litigation was dismissed and, for unspecified reasons, sanctions were imposed upon Plaintiffs. (*Id.*)

Plaintiffs are now suing to recover their losses associated with the alleged malpractice. The Complaint names several Defendants: 1) Braverman; 2) the law firm of Braverman & Kaskey, P.C. ("B&K") (improperly pled as Braverman & Kaskey, Ltd.),[5] which, according to the

4. For the sake of clarity, Plaintiffs' underlying action against First Union will hereinafter be referred to as the "Tennessee Litigation."

5. B&K is Braverman's current law firm. (*See* Braverman's Br. Opposing Remand, p. 7 n.6.)

case caption, was formerly known as Braverman, Daniels, Kaskey, Ltd. ("BDK")[6]; 3) the law firm of Fellheimer, Braverman & Kaskey, P.C. ("FB&K")[7]; and 4) several fictitiously named attorneys who worked on the Tennessee Litigation, and business entities that employed or were owned by Braverman during that period. Plaintiffs seeks various damages, including punitive damages, as well as attorneys' fees.

Braverman, the only defendant who was served with process to date, removed this action to this Court on January 31, 2008. Federal jurisdiction is premised on diversity of citizenship. As discussed below, however, his Notice of Removal improperly pleaded the citizenship BDK. He now moves to amend his Notice of Removal, while Plaintiffs cross-move to remand this case based on that pleading error. Additionally, Braverman moves to dismiss this action for a variety of reasons, including that it is time-barred, that Plaintiffs failed to join necessary and indispensable parties, and that the Complaint fails to state a claim, both as to the cause of action and as to its demand for punitive damages and attorneys' fees.

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6. Braverman disputes that B&K was ever known as Braverman, Daniels, Kaskey, Ltd. (Braverman's Br. Opposing Remand, p. 6.) He notes in fact that Braverman, Daniels, Kaskey, Ltd. still exists and is still known by that name. (*Id.*)

7. According to the Notice of Removal, FB&K remains in existence but is now known as Braverman, Kaskey & Capara ("BK&C"). (Notice of Removal ¶ 18.)

Appendix B

II. DISCUSSION

A. Motions Related to Braverman's Removal of this Case

Because removal of this case is premised on diversity jurisdiction, the Notice of Removal contains several allegations pertaining to the parties' citizenship. It avers that Catherine and Martin are citizens of New Jersey and Florida, respectively,[8] while Braverman and the relevant business entities with which he is associated are citizens of Pennsylvania.[9] (*Id.* ¶¶ 9-10, 12, 14-15, 18.) Specifically, B&K and BK&C are both Pennsylvania corporations, and have principal places of business in Pennsylvania. (*Id.* ¶¶ 14, 18.) BDK is a limited liability

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8. Plaintiffs "acknowledge . . . that they are citizens of the State of New Jersey." (Pl. Br. Supporting Remand, p. 1.) However, this is inaccurate with respect to Martin; while he "maintains a residence in Longport, Atlantic County, New Jersey," (*id.*,) public records indicate that he is a citizen of Florida. He claims a homestead exemption for his home in Delray Beach, Florida. (*See* Braverman's Br. Supporting Dismissal, Exh. C.) He is registered to vote in Florida. (*See id.*, Exh. D.) And he carries a Florida driver's license. (*See id.*, Exh. E.) Under these circumstances, Martin is a Florida, not New Jersey, citizen. *See Edick v. Poznanski*, 6 F. Supp. 2d 666, 669-70 (W.D. Mich. 1998) (holding that a person who maintained homes in Michigan and Illinois was a Michigan citizen because she claimed a homestead exemption on her Michigan home, voted in Michigan, carried a Michigan driver's license, and registered and insured her car in Michigan).

9. The relevant business entities are B&K, BDK, and BK&C.

company. (*Id.* ¶ 15.) But its citizenship was pleaded as if it was a corporation. In other words, the Notice of Removal states it is organized under Pennsylvania law and has a principal place of business in Pennsylvania. (*Id.*) Recognizing this problem, Braverman moves to amend the Notice of Removal to properly allege the basis for BDK's citizenship, namely by pleading the citizenship of each of BDK's members. *See Hessert Constr. N.J., LLC v. Garrison Architects, PC*, Civil Action No. 06-5696, 2007 U.S. Dist. LEXIS 50997, at *7-8 (D.N.J. July 13, 2007) ("[T]he citizenship of a limited liability company is determined by the citizenship of its members.").

Plaintiffs filed no opposition to Braverman's motion to amend. (*See* Docket Entry No. 17.) Instead, after Braverman had already filed his motion to amend, they filed a motion to remand based entirely on the failure to plead the citizenship of BDK's members. As discussed below, Braverman's error in pleading BDK's citizenship is minor and permitting amendment will not prejudice Plaintiffs. Thus, Braverman's motion is granted, and Plaintiffs' motion is denied.

Under Federal Rule 15(a)(2), courts "should freely give leave to amend when justice so requires." The United States Supreme Court has explained this standard:

> In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant,

> repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the other party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962).

Additionally, under 28 U.S.C. § 1653, "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." This provision "addresses only incorrect statements about jurisdiction that actually exists, and not defects in the jurisdictional facts themselves." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 831 (1989). Moreover, "'[a]n imperfect or defective allegation is distinguished from a missing allegation, which may not be added by amendment after the 30-day period [for removal under 28 U.S.C. § 1446] has expired.'" *Gilberg v. Stepan Co.*, 24 F. Supp. 2d 325, 347 (D.N.J. 1998) (quoting *Am. Educators Fin. Corp. v. Bennett*, 928 F. Supp. 1113, 1115 (M.D. Ala. 1996)) (second alteration in original).

Courts have permitted parties to amend their notices of removal under circumstances remarkably similar to those in the present case. In *Muhlenbeck v. Ki, LLC*, 304 F. Supp. 2d 797 (E.D. Va. 2004), for example, the defendant alleged in its notice of removal that it was an Alaskan limited liability company with a principal place of business in Colorado. *Id.* at 798. The plaintiff moved to remand the case because the

defendant improperly pleaded the basis for a limited liability company's citizenship. *Id.* The defendant responded by moving to amend the notice of removal to supply allegations of the citizenship of its members. *Id.* at 798-99. The court determined that amendment was appropriate because the defendant "alleged all of the grounds necessary for removal in its original removal petition, but it imperfectly alleged its own citizenship." *Id.* at 801. Moreover, correction of that defect required "only a technical amendment." *Id.* at 802. Thus, the court granted the defendant's motion to amend, and denied the plaintiff's motion to remand. *Id.*

This case is very similar to *Muhlenbeck*, the reasoning of which this Court finds persuasive. Here, as there, the Notice of Removal asserted diversity jurisdiction, but imperfectly alleged the citizenship of a limited liability company by treating it like a corporation for diversity purposes. This defect is merely technical—the proposed amended Notice of Removal states that BDK's three members are all citizens of Pennsylvania, making BDK a citizen of that state. (Prop. Am. Notice of Removal ¶ 15.) This is completely consistent with the original Notice of Removal's allegation that BDK is a citizen of Pennsylvania. (Notice of Removal ¶15.) There is no indication that permitting the amendment will prejudice Plaintiffs, especially since they submitted no opposition to Braverman's motion to amend. Accordingly, his motion is granted and Plaintiffs' motion to remand is denied.

Appendix B

B. Braverman's Motion to Dismiss

Braverman moves to dismiss this action on several bases. First, he argues that it is time-barred by the applicable statute of limitations. Second, he contends that the Complaint fails to state a claim upon which relief can be granted, both as to Plaintiffs' legal malpractice cause of action and their demand for punitive damages and attorneys' fees. Third, he asserts that this action should be dismissed under Federal Rules 12(b)(7) and 19 for failure to join necessary and indispensable parties, namely other attorneys involved in the Tennessee Litigation. As discussed below, the Court agrees that this case is untimely and, in any event, that the Complaint does not sufficiently plead a legal malpractice claim. Braverman's other arguments—regarding punitive damages, attorneys' fees, and joinder—will not be addressed.

1. Standard on a Motion to Dismiss for Failure to State a Claim

A complaint should be dismissed pursuant to Rule 12(b)(6) if the alleged facts, taken as true, fail to state a claim. Fed. R. Civ. P. 12(b)(6); *see In re Warfarin Sodium*, 214 F.3d 395, 397-98 (3d Cir. 2000). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-

65 (2007) (internal citations omitted). Thus, a motion to dismiss should be granted unless the plaintiff's factual allegations are "enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true (even if doubtful in fact)." *Id.* at 1965 (internal citations omitted).

When deciding a motion to dismiss pursuant to Rule 12(b)(6), only the allegations in the complaint, matters of public record, orders, and exhibits attached to the complaint, are taken into consideration. *Lum v. Bank of Am.*, 361 F.3d 217, 222 n.3 (3d Cir. 2004). A district court must accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom. *See Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384 (3d Cir. 1994). Moreover, these allegations and inferences must be viewed in the light most favorable to the plaintiff. *Id.* However, a court need not accept "'unsupported conclusions and unwarranted inferences,'" *Baraka v. McGreevey*, 481 F.3d 187, 195 (3d Cir. 2007) (citation omitted), and "[I]llegal conclusions made in the guise of factual allegations . . . are given no presumption of truthfulness," *Wyeth v. Ranbaxy Labs., Ltd.*, 448 F. Supp. 2d 607, 609 (D.N.J. 2006) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)); *see also Kanter v. Barella*, 489 F.3d 170, 177 (3d Cir. 2007) (quoting *Evancho v. Fisher*, 423 F.3d 347, 351 (3d Cir. 2005)) ("[A] court need not credit either 'bald assertions' or 'legal conclusions' in a complaint when deciding a motion to dismiss.").

It is not necessary for the plaintiff to plead evidence. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977). The question before the court is not whether the plaintiff will ultimately prevail. *Watson v. Abington Twp.*, 478 F.3d 144, 150 (2007). Instead, the court simply asks whether the plaintiff has articulated "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 127 S. Ct. at 1974.

2. Analysis of Braverman's Motion to Dismiss

a. This action is governed and time-barred by Tennessee law.

Braverman contends that this action should be dismissed because it is time-barred under Tennessee law. Plaintiffs primarily argue that New Jersey law, under which this suit is timely, governs.[10] Resolving this dispute requires a choice of law analysis. Before turning to that analysis, however, the Court must respond to three intertwined threshold arguments raised by Plaintiffs: 1) Braverman's limitations defense is prematurely raised; 2) Braverman's attachment of several extrinsic documents to his motion to dismiss converts it into a motion for summary judgment; and 3) Plaintiffs require additional discovery in order to oppose Braverman's motion.

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10. As discussed in part II.B.2.a.i.a, *infra*, Plaintiffs additionally asserted at oral argument that this action would be timely even if Tennessee law applied.

At oral argument, Plaintiffs suggested that the Court could not consider Braverman's limitations defense in the context of his motion to dismiss for failure to state a claim. The Court disagrees. Although a statute of limitations defense is typically raised in the defendant's answer, the so-called "Third Circuit Rule" permits such a defense to be raised in a Rule 12(b)(6) motion if "'the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations.'" *Robinson v. Johnson*, 313 F.3d 128, 135 (3d Cir. 2002) (quoting *Hanna v. U.S. Veterans' Admin. Hosp.*, 514 F.2d 1092, 1094 (3d Cir. 1975)). "'If the bar is not apparent on the face of the complaint, then it may not afford the basis for a dismissal of the complaint under Rule 12(b)(6).'" *Id.* (quoting *Bethel v. Jendoco Constr. Corp.*, 570 F.2d 1168, 1174 (3d Cir. 1978)). But courts are permitted to examine public records, including those concerning judicial proceedings, when considering a motion to dismiss for failure to state a claim. *See S, Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999). This is true even if the motion to dismiss is premised on a statute of limitations argument. *See Caleb v. CRST, Inc.*, 43 Fed. Appx. 513, 515 (3d Cir. 2002). As discussed below, the Complaint itself and several public records related to the Tennessee Litigation reveal that this action is untimely. Accordingly, Braverman's limitations defense is properly before the Court.

Relatedly, there is no merit to Plaintiffs' assertion that this motion should be converted into one for summary judgment. The various exhibits attached to

Braverman's motion are mostly public records related to the Tennessee Litigation. A court may consider such documents without converting a pending motion to dismiss into a motion for summary judgment. *See Lum*, 361 F.3d at 222 n.3; *S. Cross Overseas Agencies*, 181 F.3d at 426; *see also Golden v. Cook*, 293 F. Supp. 2d 546, 551 (W.D. Pa. 2003) ("[I]t is well established that courts are permitted to consider [in a Rule 12(b)(6) motion] matters of which they may take judicial notice, including . . . publicly available records and transcripts from judicial proceedings 'in related or underlying cases which have a direct relation to the matters at issue.'" (citations omitted)). In addition, Braverman attached to his motion a copy of the retainer agreement into which he and Plaintiffs entered. This document is not a public record, but it does not automatically follow that conversion is required. Any document can be considered in the context of a Rule 12(b)(6) motion if it "form[s] the basis of a claim." *Lum*, 361 F.3d at 222 n.3. A document is said to form the basis of a claim if it is "'integral to or explicitly relied upon in the complaint.'" *Id.* (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1426). Here, the Complaint specifically references the retainer agreement, thereby making the document's consideration appropriate in the Rule 12(b)(6) context.[11] (*See* Compl. 2/1.) Thus, this motion to dismiss will not be converted into a motion for summary judgment.

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11. It should be noted that Braverman attached the retainer agreement to his motion to support his argument that a demand for attorneys' fees is impermissible in a legal malpractice case. The Court does not address this argument in this Opinion and, by extension, has no reason to actually examine the retainer agreement.

Finally, even if this was a motion for summary judgment, Plaintiffs' request for additional discovery would be denied. Rule 56 permits "[a] party against whom relief is sought [to] move at any time . . . for summary judgment . . . ." Fed. R. Civ. P. 56(b). If the non-movant requires additional discovery in order to oppose the motion, it must follow the procedure outlined in Rule 56(f). Specifically, it must submit an affidavit specifying the reasons "it cannot present facts essential to justify its opposition . . . ." Fed R. Civ. P. 56(f). To warrant additional discovery, however, the affidavit "must move beyond mere generalities and specify what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained." *Scott v. Graphic Communs. Int'l Union, Local 97-B*, 92 Fed. Appx. 896, 900 (3d Cir. 2004). If a party fails to submit an affidavit, a court may deny its request for additional discovery for failure to comply with Rule 56(f). *See, e.g., Lunderstadt v. Colafella*, 885 F.2d 66, 70 (3d Cir. 1989).

Here, Plaintiffs have not filed any affidavit in support of their request for additional discovery. This failure alone would justify the Court's denial of their request. Moreover, Plaintiffs only generalize as to the information they seek, stating their desire to "flesh[] out" their allegations that Braverman was negligent. (Pl. Br. Opposing Dismissal, p. 6.) This does nothing to explain how summary judgment would be precluded where the principal argument in favor of dismissal relates to the untimeliness of the action. Therefore, it is appropriate to now consider Braverman's limitations defense and the choice of law question it raises.

Appendix B

In a diversity case, such as this one, federal courts "determine which state's substantive law governs by applying the choice-of-law rules of the jurisdiction in which the district court sits." *Garcia v. Plaza Oldsmobile Ltd.*, 421 F.3d 216, 219 (3d Cir. 2005) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)). New Jersey's choice of law regimen therefore guides this analysis. New Jersey uses a flexible governmental interest analysis "which requires application of the law of the state with the greatest interest in resolving the particular issue . . . ." *Gantes v. Kason Corp.*, 679 A.2d 106, 109 (N.J. 1996).

Until 1973, New Jersey applied the forum's statute of limitations irrespective of which state's substantive law governed the case. *See Schum v. Bailey*, 578 F.2d 493, 495 (3d Cir. 1978). In 1973, however, the New Jersey Supreme Court determined that New Jersey courts would borrow foreign statutes of limitations under narrowly defined circumstances:

> When the cause of action arises in another state, the parties are all present in and amenable to the jurisdiction of that state, New Jersey has no substantial interest in the matter, the substantive law of the foreign state is to be applied, and [if] its limitation period has expired at the time suit is commenced here, New Jersey will hold the suit barred. In essence we will "borrow" the limitation law of the foreign state.

Heavner v. Uniroyal, Inc., 305 A.2d 412, 418 (N.J. 1973). This does not mean New Jersey courts will always

borrow the limitations period of the foreign jurisdiction. *See Henry v. Richardson-Merrell, Inc.*, 508 F.2d 28, 32 n.9 (3d Cir. 1978) ("[*Heavner*] eschews all mechanistic rules."). Rather, the *Heavner* rule "provides a limited and special exception to the general rule that the rule of the forum determines the applicable period of limitations." *O'Keeffe v. Snyder*, 416 A.2d 862, 868 (N.J. 1980).

According to the Third Circuit, the *Heavner* rule requires federal courts sitting in diversity in New Jersey to apply the statute of limitations of the state whose substantive law governs.[12] *See Warriner v. Stanton* (*Warriner II*), 475 F.3d 497, 500 n.2 (3d Cir. 2007) ("New Jersey 'borrows' the statute of limitations of the state whose substantive law applies to the case."); *Schum*, 578 F.2d at 495 ("We glean from *Heavner* that the critical determination underlying the 'borrowing' of a foreign statute of limitations is a determination as to whether a foreign substantive law is to be applied."); *Henry*, 508

12. Braverman suggests there is a *per se* rule in New Jersey that, in legal malpractice cases, the substantive law to be applied is the law that would have governed the underlying action. He cites to the New Jersey Appellate Division's decision in *Boyson, Inc. v. Archer & Greiner, P.C.*, 705 A.2d 1252 (N.J. Super. Ct. App. Div. 1998), for support, but his reliance is misplaced. The *Boyson* court did not announce a *per se* rule for all malpractice cases; it merely held that that particular malpractice case should be governed by Pennsylvania law, the law that would have governed the underlying action. *See id.* at 1257. It reached this conclusion only after discussing New Jersey's governmental interest test, *see id.* at 1256, and noting the significant contacts the case and the parties had with Pennsylvania, *see id.* at 1257.

F.2d at 37 ("Absent a finding that New Jersey substantive law applies, *Heavner* requires borrowing of the foreign limitations period."). For this reason, the courts have held that *Heavner* extended the governmental interest analysis, previously reserved for choice of substantive law, to conflicts related to the applicable limitations period. *See Schum*, 578 F.2d at 495; *Henry*, 508 F.2d at 32; *Gantes*, 679 A.2d at 109.

i. New Jersey's Governmental Interest Analysis

New Jersey's governmental interest test necessitates a two-prong approach. First, the Court must determine whether there is an actual conflict between the law of the states involved. *Warriner II*, 475 F.3d at 501; *Fu v. Fu*, 733 A.2d 1133, 1138 (N.J. 1999). Second, assuming there is an actual conflict, the Court must "determine which state has the most significant relationship to the occurrence and the parties with respect to" the legal issue in question. *Fu*, 733 A.2d at 1138. Each prong of the analysis will be discussed in turn below.

a. There is an actual conflict between Tennessee and New Jersey's statutes of limitations.

As noted, the first step in the analysis is to determine whether there is an actual conflict present. *Warriner II*, 475 F.3d at 501. This is important "because 'where the application of either state's law would yield the same result, no conflict exists to be resolved.'" *Id.*

(quoting *High v. Balun*, 943 F.2d 323, 325 (3d Cir. 1991)). In the absence of an actual conflict, New Jersey courts, including federal courts sitting therein, apply New Jersey law. *Lebegern v. Forman*, 471 F.3d 424, 428 (3d Cir. 2006).

New Jersey's statute of limitations for legal malpractice actions is six years from the date on which the action accrued. N.J. Stat. Ann. § 2A:14-1; *see Vastano v. Algeier*, 837 A.2d 1081, 1084 (N.J. 2003). In Tennessee, the statute of limitations for such cases is one year. *See* Tenn. Code Ann. § 28-3-104(a)(2). Under both states' law, a legal malpractice action accrues when the plaintiff 1) suffers an actual injury and 2) discovers, or should discover through reasonable efforts, that the defendant-attorney's conduct caused this injury. *Vastano*, 837 A.2d at 1084-85; *John Kohl & Co. v. Dearborn & Ewing*, 977 S.W.2d 528, 532 (Tenn. 1998).

Braverman argues that Plaintiffs' legal malpractice claim accrued no later than November 2006. Plaintiffs did not contest this in their opposition brief. At oral argument, however, they asserted that this suit really accrued in January 2007. Under Braverman's view, there would be an actual conflict because Tennessee's shorter limitations period would have expired before December 14, 2007—the date on which this action was filed. If, on the other hand, Plaintiffs' assertion is correct, this suit would be timely even if Tennessee law applied. In other words, there would not be an actual conflict under Plaintiffs' approach, and the Court would simply apply New Jersey law.

Appendix B

The only injuries alleged in the Complaint are the dismissal of the Tennessee Litigation and the imposition of sanctions against Plaintiffs. (Compl. 1/6.) According to public records related to the Tennessee Litigation, these sanctions were first imposed on September 27, 2005. (Braverman's Br. Supporting Dismissal, Exh. F., p. 70; *see id.*, Exh. G.) The state court filed its final decree dismissing the Tennessee Litigation on December 14, 2005. (*Id.*, Exh. F., p. 73.) Then, on November 2, 2006, additional sanctions were imposed. (*Id.*, Exh. F., p. 86; *see id.*, Exh. H.) According to Braverman, this action therefore could not have accrued later than November 2006.

Plaintiffs counter that the statute of limitations was tolled until after all appeals had been exhausted because only at that point would they know whether they were truly injured by Braverman's conduct. By Plaintiffs' calculation, the case did not actually accrue until January 29, 2007—the date of the last docket entry relating to the Tennessee Litigation, after all appeals had ended.

Plaintiffs' argument, though clever, is completely inconsistent with Tennessee law. The Tennessee Supreme Court has rejected the idea that the statute of limitations for legal malpractice should be tolled pending the appeal of a client's underlying suit. *See Carvell v. Bottoms*, 900 S.W.2d 23, 29 (Tenn. 1995). Braverman's position is therefore correct. Plaintiffs' injuries were suffered, at the latest, on November 2, 2006. Presumably, Plaintiffs would have had knowledge

of these injuries, and their relationship to Braverman's conduct, immediately or shortly thereafter. *See Humphreys v. Argabrite*, 162 Fed. Appx. 544, 546 (6th Cir. 2006) (applying Tennessee law and holding that a plaintiff's legal malpractice claim against the lawyer who represented her in a divorce proceeding accrued on the date the divorce decree was entered "because she knew or should have known of her injury at that point"). Thus, this action accrued no later than November 2006. An actual conflict exists because the December 14, 2007 Complaint would be timely under New Jersey law, but not under Tennessee law.

b. The contacts and policies at issue reveal that Tennessee has the greatest interest in applying its statute of limitations to this case.

Because an actual conflict exists, the Court must move on to the second prong of the governmental interest analysis. This prong requires courts to "determine which state has the most significant relationship to the occurrence and the parties with respect to" the legal issue in question. *Fu*, 733 A.2d at 1138. This in turn requires courts to "'identify the governmental policies underlying the law of each state and how those policies are affected by each state's contacts to the litigation and to the parties.'" *Warriner II*, 475 F.3d at 501 (quoting *Veazey v. Doremus*, 510 A.2d 1187, 1189 (N.J. 1986)).

Appendix B

I. Relevant Policies

The starting point for the second prong of New Jersey's governmental interest analysis is to identify the relevant policies evidenced by the laws of each state. *Henry*, 508 F.2d at 32; *see Warriner II*, 475 F.3d at 501. In both New Jersey and Tennessee, legal malpractice actions sound primarily in tort. *See Grunwald v. Bronkesh*, 621 A.2d 459, 492 (N.J. 1993) ("A legal-malpractice action derives from the tort of negligence."); *Gibson v. Trant*, 58 S.W.3d 103, 108 (Tenn. 2001) (referring to the "tort of legal malpractice"). The Third Circuit has "'identified New Jersey's policies in a tort context as consisting primarily of compensation and deterrence.'" *Warriner II*, 475 F.3d at 501 (quoting *Schum*, 578 F.2d at 496). Presumably, Tennessee's tort law also evinces the dual policies of compensation and deterrence "'[b]ecause every tort rule, to some extent, is designed both to deter and to compensate.'" *Id.* (quoting *Fu*, 733 A.2d at 1141).

These policies of compensation and deterrence do not exist in a vacuum; they must be balanced against the need for eventual repose. According to the New Jersey Supreme Court, the purposes underlying statutes of limitations are two-fold:

> (1) to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of

> stale claims, and (2) "to penalize dilatoriness and serve as a measure of repose."

Rivera v. Prudential Property & Casualty Ins. Co., 514 A.2d 1296, 1300 (N.J. 1986) (citations omitted); *see also Gantes*, 679 A.2d at 110 ("The purpose underlying any statute of limitations is 'to "stimulate to activity and punish negligence" and "promote repose by giving security and stability to human affairs."'") (citations omitted). Tennessee's statute of limitations is based on similar policy concerns. *See, e.g., Quality Auto Parts Co. v. Bluff City Buick Co.*, 876 S.W.2d 818, 820 (Tenn. 1994) ("[T]he policy reasons for the development of statutes of limitations [are] to ensure fairness to the defendant by preventing undue delay in bringing suits on claims, and by preserving evidence so that facts are not obscured by the lapse of time or the defective memory or death of a witness."). Obviously, Tennessee and New Jersey differ, in the context of a malpractice action, as to the precise length of time that achieves compensation and deterrence, and avoids the litigation of stale claims. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975) ("[T]he length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."). But Tennessee's judgment as to how long attorneys should be exposed to liability for their alleged malpractice is on an equal footing with New Jersey's. *See Fu*, 733 A.2d at 1141 ("Rules . . . that deny liability are entitled to equal consideration in choice-of-law determinations as are rules imposing liability.").

Finally, it is noteworthy that New Jersey has a policy against forum shopping in cases in which it has little or no interest. *See Gantes*, 679 A.2d at 113 (citing *Henry*, 508 F.2d at 35) ("[T]he policy against forum shopping is intended to ensure that New Jersey courts are not burdened with cases that have only 'slender ties' to New Jersey."). Indeed, this is the policy behind the *Heavner* rule. *See Warriner II*, 475 F.3d at 500 n.2.

2. Relevant Contacts and their Relationship to the Policies of Each State

Having identified each states' policies, the Court must next consider "'whether those concerns will be furthered by applying that law to the multi-state situation.'" *Fu*, 733 A.2d at 1140 (quoting *Pfizer, Inc. v. Employers Ins. of Wausau*, 712 A.2d 634, 640 (N.J. 1998)). Factors enumerated in § 6 of the Restatement (Second) of Conflicts of Law (1971) ("the Restatement") guide New Jersey courts in applying the governmental interest test in tort cases. *Warriner II*, 475 F.3d at 500. These considerations include: (1) the interests of interstate comity; (2) the interests of the parties; (3) the interests underlying the field of tort law; (4) the interests of judicial administration; and (5) the competing interests of the states. *Id.* The most important of these considerations is the competing interest of the states. *Id.* This requires a court to consider "whether application of a competing state's law under the circumstances of the case 'will advance the policies that the law was intended to promote.' *Fu*, 733 A.2d at 1142 (quoting *Pfizer*, 712 A.2d at 639). In other words, "[i]f a

state's contacts are not related to the policies underlying its law, then that state does not possess an interest in having its law apply. Consequently, the qualitative, not the quantitative, nature of a state's contacts ultimately determines whether its law should apply." *Veazey*, 510 A.2d at 1189-90 (internal citations omitted).

In evaluating contacts in the choice of law context, the New Jersey Supreme Court has adopted the approach taken by the Restatement. *Warriner II*, 475 F.3d at 502 (citing *Fu*, 733 A.2d at 1152). Section 145(2) of the Restatement identifies the contacts that are most relevant to the governmental interest analysis in tort cases: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship between the parties is centered. *Id.*

An evaluation of the relevant contacts, and the policies they implicate, reveals that Tennessee has the most significant relationship to this case. The injury to Plaintiffs, dismissal of the Tennessee Litigation and imposition of sanctions, occurred in Tennessee. *See Foulke v. Dugan*, 187 F. Supp. 2d 253, 257 (E.D. Pa. 2002) (stating, in a legal malpractice case, that the injury of being procedurally barred from pursuing an underlying personal injury claim in Pennsylvania's state courts occurred in Pennsylvania). This is significant because Tennessee has an interest in compensating victims for injuries resulting from legal malpractice and

provides a cause of action for such injuries. *See, e.g., Sanjines v. Ortwein & Assocs., P.C.*, 984 S,W.2d 907, 910 (Tenn. 1998). This compensation interest is amplified where the injury caused by the malpractice occurred in Tennessee. *See David B. Lilly Co., Inc. v. Fisher*, 18 F.3d 1112, 1119 (3d Cir. 1994) ("'[A] state has an obvious interest in regulating the conduct of persons within its territory and in providing redress for injuries that occurred there.'" (quoting the Restatement, § 145 cmt. d)).

The next contact is one on which Plaintiffs place particular emphasis—the place where the injury-causing conduct occurred. Plaintiffs argue that Braverman's alleged malpractice is not limited to his prosecution of the Tennessee Litigation, but also extends to advice he gave them in multiple states, including New Jersey. As a result, they argue New Jersey has a strong interest in applying its law, at least with respect to their claims concerning Braverman's advice. The Third Circuit's decision in *Lilly Co.* is instructive in considering this argument.

Lilly Co. arose when a private investment firm acquired a Delaware corporation whose business relied on it maintaining a "small business" status. *Id.* at 1114. Unfortunately, the acquirer's attorneys structured the transaction in such a way that the acquiree lost that status. *See id.* at 1116. One of the defendants, a New York law firm, argued that New York, rather than Delaware, law governed the resulting malpractice action. *Id.* at 1118. To this end, it asserted that its advice was "sought and rendered" from its New York office. *Id.* at

1120. Additionally, the record revealed that some legal work had also been performed in Washington, D.C. and Missouri. *Id.* For these reasons, the Third Circuit acknowledged that the alleged negligence was committed by attorneys whose "legal services originated in other states." *Id.* Nonetheless, the court held, "[a]s a practical matter," that the attorneys' legal services were rendered in Delaware. *Id.*

This case is like *Lilly Co.* The injury here was the dismissal of the Tennessee Litigation and the imposition of sanctions. While Braverman may have done some work—including giving advice—in New Jersey, the allegedly negligent conduct that caused Plaintiffs' injury must, as a practical matter, be deemed to have occurred in Tennessee. As a result, Tennessee has a deterrence interest in seeing its tort law govern this case. *See Schum*, 578 F.2d at 501 (noting that the tort law policy of deterrence "is generally associated with the sovereignty *in which past misconduct took place* and in which future misconduct may recur.") (emphasis added).

The next set of contacts to be evaluated is the parties' domicile, place of business, and the like. Braverman is a Pennsylvania domiciliary. The various business entities with which he is associated—B&K, BDK, and BK&C—are all Pennsylvania corporations or limited liability companies. But no one asserts, and the Court highly doubts, that Pennsylvania has a significant interest in this case. *See Heavner*, 305 A.2d at 414 n.3

(explaining that New Jersey did not have an interest where its only connection with the parties and the dispute was that the defendant was a New Jersey corporation).

Plaintiffs make a great deal of the fact that Braverman is admitted to practice in New Jersey; they suggest that the New Jersey Supreme Court's power over members of its bar gives the state a significant interest in this case. A state certainly has "an obvious interest in regulating the conduct of its own licensed professionals," but "this interest is not dispositive." *Lilly Co.*, 18 F.3d at 1120. Braverman was admitted *pro hac vice* in Tennessee in order to prosecute the Tennessee Litigation. (*See* Braverman's Br. Supporting Dismissal, Exh. A.) Tennessee has an interest in regulating an attorney's conduct within its borders and this outweighs New Jersey's interest in regulating a New Jersey lawyer whose alleged malpractice occurs elsewhere. *See Crossland Sav. FSB v. Rockwood Ins. Co.*, 692 F. Supp. 1510, 1512 (S.D.N.Y. 1988) (concluding that New York's interest in regulating a Texas lawyer's conduct occurring within its borders outweighed Texas's interest in regulating its licensed professional), *cited in Lilly Co.*, 18 F.3d at 1120 n.5.

Plaintiffs assert that Martin is a New Jersey resident, presumably because "New Jersey courts have long recognized a significant public interest in compensating their injured domiciliaries." *Dent v. Cunningham*, 786 F.2d 173, 176 (3d Cir. 1986). However, public records clearly demonstrate that Martin is a

Florida, not New Jersey, domiciliary. *See*, *supra*, note 8. This is important because New Jersey's tort law has no interest in compensating a foreign plaintiff. *See Henry*, 508 F.2d at 33. The parties agree that Catherine is a New Jersey domiciliary, which implicates New Jersey's compensation interest. But Catherine's financial stake in New Midland and, by extension, her interest in this action is minuscule. *See*, *supra*, note 2. This ostensibly reduces the impact of New Jersey's interest in compensating her. Moreover, any compensation interest New Jersey does have "is greatly attenuated in this case because New Jersey has no connection to the acts giving rise to this lawsuit." *Warriner v. Stanton* (*Warriner I*), Civil Action No. 03-2211 (JBS), 2005 U.S. Dist. LEXIS 11465, at *14 (D.N.J. June 14, 2005).

Lastly, the Court considers the place where the parties' relationship was centered. According to the Complaint, Braverman was retained "for the purpose of filing a lawsuit . . . in the Circuit Court of Blount County, Tennessee . . . ." (Compl. 1/1.) In other words, the purpose of the relationship was to prosecute the Tennessee Litigation, which leads to the conclusion that the parties' relationship was centered in Tennessee. *See Lilly Co.*, 18 F.3d at 1120 (noting the "relational strands between the parties . . . span several states," but nonetheless holding that an attorney-client relationship was centered in Delaware where the "purpose of the relationship" was to facilitate the client's acquisition of a Delaware corporation). This further demonstrates Tennessee's substantial connection to this

litigation and again implicates that state's interests in compensation and deterrence with respect to legal malpractice that occurs within its borders.

Tennessee's contacts with this case take on even greater significance because they were not fortuitous, but rather were intentionally initiated by Plaintiffs. They decided to form New Midland, a Tennessee partnership. They decided to conduct business in Tennessee under New Midland's name. And they decided to hire Braverman for the purpose of prosecuting the Tennessee Litigation in Tennessee. *See Warriner II*, 475 F.3d at 503-04 (observing that a state's contacts with litigation are especially relevant when they are not fortuitous). Additionally, while Catherine is a citizen of New Jersey, it must be remembered that "'citizens do not . . . carry their home state's laws with them wherever they go.'" *Id.* at 504 (quoting *Amoroso v. Burdette Tomlin Mem'l Hosp.*, 901 F. Supp. 900, 906 (D.N.J. 1995)).

New Jersey has only slender ties to this case, which triggers its policy against forum shopping. *See Gantes*, 679 A.2d at 113 (citing *Henry*, 508 F.2d at 35). By contrast, Tennessee has a substantial interest in this case. As a result, Tennessee law governs. Under this law, Plaintiffs' legal malpractice claim is stale. Accordingly, this suit is time-barred and therefore dismissed.

b. The Complaint fails to sufficiently state a claim for legal malpractice.

In addition to being time-barred, this action must be dismissed because the Complaint fails to adequately state a claim for legal malpractice. Instead, it merely recites the elements of such a claim, which is impermissible under Supreme Court precedent.

Once a case is removed to federal court, its pleadings are governed by the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 81(c)(1). Rule 8 of the Federal Rules requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2). This statement does not require "detailed factual allegations." *Twombly*, 127 S. Ct. at 1964. But some factual allegations are required in order to give the defendant fair notice of the claims against him. *See id.* at 1964-65 & n.3. A complaint must contain enough factual specificity "to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 1965. Significantly, the Supreme Court has held that Rule 8 is not satisfied where the complaint contains mere "labels and conclusions," or "a formulaic recitation of the elements of a cause of action . . . ." *Id.* at 1964-65 (citations omitted).

To state a claim for legal malpractice, under either New Jersey or Tennessee law, a plaintiff must sufficiently allege the following basic elements: (1) a duty owed to

the plaintiff; (2) a breach of that duty by the attorney; (3) an injury to the plaintiff; and (4) a factual and proximate link between the attorney's breach and the plaintiff's injury. *See McGrogan v. Till*, 771 A.2d 1187, 1193 (N.J. 2001); *Gibson*, 58 S.W.3d at 108. In this case, Plaintiffs allege that Braverman

> did breach his duty to the plaintiffs and was in fact negligent, careless and reckless in his representation, and failed to utilize that standard of care imposed by law when attending to the legal needs and requirements of his clients. Defendant failed to exercise that degree of knowledge and skill ordinarily possessed and used by other similarly situated attorneys in the practice of law and in the prosecution of the plaintiffs' claims in the aforenoted lawsuit. The defendant's multiple acts of carelessness and negligence, directly and proximately caused the plaintiffs' lawsuit to be dismissed, the loss of any and all claims and entitlements to relief by the plaintiffs and further caused the imposition of sanctions and penalties imposed against the plaintiffs.

(Compl. 1/6.) Plaintiffs further allege that

> Defendant . . . and his firm breached each and every duty of care due and owing the plaintiffs by failing to undertake those necessary and appropriate actions which any reasonable and

> competent attorney would employ under the same and similar circumstances.

(*Id.* 2/3.)

These paragraphs constitute the only allegations speaking to Braverman's alleged breach of his duty to Plaintiffs. It is evident from their face, however, that they are precisely the kind of "formulaic recitation[s]" the Supreme Court criticized in *Twombly*. The Complaint provides no factual context whatsoever with respect to Braverman's alleged breach. It does not identify, even generally, the nature of the breach. Was it a negligent action Braverman took on Plaintiffs' behalf or was it a failure to act? What were the circumstances of these actions or omissions? When, even generally, did these breaches occur? Factual allegations speaking to these questions are essential, particularly because the Tennessee Litigation took place over a course of many years. As the Complaint currently stands, Braverman must speculate as to what specific conduct or decision constitutes an alleged breach of his duty of care. Plaintiffs therefore did not give him the notice required by Rule 8.

Plaintiffs note that, because this is a malpractice action, New Jersey law requires them to submit an affidavit of merit within sixty days after Braverman answers the Complaint. *See* N.J. Stat. Ann. § 2A:53A-27. They contend this affidavit will provide Braverman with adequate notice of the claims against him, thereby

satisfying their pleading obligations. This argument is completely without merit. According to the Third Circuit,

> [t]he affidavit of merit statute has no effect on what is included in the pleadings of a case or the specificity thereof. The affidavit is not a pleading, is not filed until after the pleadings are closed, and does not contain a statement of the factual basis for the claim. Its purpose is not to give notice of the plaintiff's claim, but rather to assure that malpractice claims for which there is no expert support will be terminated at an early stage in the proceedings.

Chamberlain v. Giampapa, 210 F.3d 154, 160 (3d Cir. 2000). Similarly, this Court has previously observed that

> [t]he affidavit need not contain any facts or evidence; it need only contain a statement of opinion regarding the facts already contained in the complaint. The affidavit thus does not serve to place the defendant on notice of any aspect of the claim not already contained in the complaint and does not aver anything of consequence to the litigation.

RTC Mortgage Trust 1994 N-1 v. Fidelity Nat'l Title Ins. Co., 981 F. Supp. 334, 343-44 (D.N.J. 1997). Thus, the Complaint's pleading defects cannot be remedied through the submission of an affidavit of merit.

Plaintiffs alternatively argue that they could correct the Complaint's defects by filing a more definite statement, but this contention is unavailing. Federal Rule 12(e) permits a party to move for a more definite statement "if a pleading . . . is so vague or ambiguous that [the] party cannot reasonably be required to frame a responsive pleading . . . ." Fed. R. Civ. P. 12(e). The plain language of this Rule contemplates that it is the responding party who may move for a more definite statement, not the party who drafted the defective pleading. Plaintiffs cite no authority to the contrary.

When a complaint fails to state a viable claim, a district court must grant the plaintiff leave to amend unless doing so would be futile. *Phillips v. County of Allegheny*, 515 F.3d 224, 236 (3d Cir. 2008). An amendment is considered futile if an amended complaint would itself fail to withstand a motion to dismiss. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1434. Ordinarily, leave would be granted in a case like this because Plaintiffs presumably could plead some facts indicative of Braverman's alleged breach. As discussed in part II.B.2.a., *supra*, however, Plaintiffs' legal malpractice claim is time-barred under the applicable statute of limitations. Permitting Plaintiffs to amend their defective pleadings would be futile because the case would still be dismissed on this basis. Accordingly, Braverman's motion to dismiss this action is granted, and leave to amend the Complaint is denied.

Appendix B

III. CONCLUSION

Braverman has successfully demonstrated that he should be permitted to amend his Notice of Removal. Plaintiffs, on the other hand, have failed to show that remand is appropriate in this case. Furthermore, the Court agrees with Braverman's contention that Tennessee's statute of limitations governs and time-bars this action, and that, in any event, the Complaint fails to sufficiently state a claim for relief. Accordingly,

IT IS THIS 12th day of August, 2008 hereby

ORDERED that Braverman's motion to amend and correct his notice of removal [6] is GRANTED; and it is further

ORDERED that Plaintiff's motion to remand this action to the New Jersey Superior Court [8] is DENIED; and it is further

ORDERED that Braverman's motion to dismiss this action [19] is GRANTED.

/s/ Joseph H. Rodriguez
JOSEPH H. RODRIGUEZ
United States District Judge